

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2019-CP-40-2750

PATRICIA BRENNAN CLARK,)
)
Plaintiff,)

v.)

RAYMOND E. MCKAY, JR., ESQ., CPA)
and MCKAY & AMOS, LLC,)
)
Defendants.)

**ORDER
GRANTING DEFENDANTS'
MOTIONS TO DISMISS COMPLAINT
AND AMENDED COMPLAINT**

This matter came before the Court on Defendants' Motion to Dismiss Complaint and Motion to Dismiss Amended Complaint. The Motions seek dismissal pursuant to Rule 12(b)(6), SCRPC and under S.C. Code Ann., § 15-36-100. A hearing on the Motions was held, duly noticed, on October 7, 2019 at 9:30 am before the Honorable L. Casey Manning at the Richland County Courthouse. Present at the hearing for the Defendants was Susan Taylor Wall, Esquire and present for the Plaintiff was Joseph Cortopassi, Esquire.

After reviewing the Complaint and Amended Complaint, the Motions and Memoranda of Law, after considering argument of counsel and after due consideration of the law, on November 18, 2019, the Court issued a Form 4 Order granting the Motions to Dismiss. The Court now issues this Order as a formal order on the matter.

PROCEDURAL BACKGROUND

Plaintiff Patricia Clark (hereinafter "Plaintiff") filed a Complaint against Defendants Raymond McKay and McKay & Amos, LLC (hereinafter "Defendants") on May 16, 2019. Defendants are professionals and pleading requirements for filing any claim against them falls under S.C. Code Ann., § 15-36-100, requiring a qualified expert affidavit to be filed

contemporaneously with the complaint. Defendants filed a Motion to Dismiss Complaint on June 13, 2019 for failure to satisfy the statutory mandates of §15-36-100 and thus failure to state a claim. Plaintiff then filed an Amended Complaint on June 19, 2019. Defendants filed a Motion to Dismiss Amended Complaint on June 27, 2019, again for failure to satisfy the statute. Both Motions to Dismiss were duly noticed and heard on October 7, 2019, as set forth above.

STANDARD OF REVIEW

The determination of whether a complaint states a valid cause of action must be made solely on the allegations set forth in the complaint. *Watts v. Metro Sec. Agency*, 346 S.C. 235, 238, 550 S.E.2d 869, 870, (Ct. App. 2001). The purpose of a pleading is to provide fair notice to the opponent and to the court and a complaint must plead more than mere legal conclusions. A plaintiff must provide facts “showing that the pleader is entitled to relief.” Rule 8(a)(2), SCRPC.

LEGAL DISCUSSION

Both the Complaint and Amended Complaint include three causes of action: Lawyer Malpractice, Negligent Misrepresentation and Breach of Contract-Financial Support Litigation Services. Because Defendants are certified public accountants, under Section 15-36-100, S.C. Code Ann., an affidavit from a qualified expert must be filed contemporaneously with the complaint. As the statute states: “the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” It is undisputed that an expert affidavit was not filed contemporaneously with either the Complaint or the Amended Complaint in this case.

The only difference between the Complaint and Amended Complaint is found in the last paragraph of both pleadings, paragraph 56. In the Complaint, Plaintiff merely cites to § 15-36-100 (C)(1), without any allegations of fact that would support a “good faith basis” to suspend for

45 days the statutory requirement for attaching an expert affidavit. In the Amended Complaint, Plaintiff again merely cites to the statute and quotes statutory language but again does not provide any factual allegations that would allow Plaintiff to circumvent the contemporaneous expert affidavit mandate.

Merely citing to statutory language is akin to asserting legal conclusions and does not satisfy the mandates of Rule 8, SCRCR, requiring factual allegations to put the opponent and the court on notice as to why the plaintiff may be entitled to relief. Section 15-36-100 speaks in terms of a “good faith” basis before allowing an exception to the contemporaneous expert affidavit mandate; without any factual allegations, neither the opponent nor the court can make a determination that a good faith basis exists for extending the expert affidavit filing deadline.

Plaintiff did not make any factual allegations in the Complaint as required to satisfy the statute and the rules of pleading; Plaintiff did not allege any facts to support a good faith basis as to why she could not obtain an expert affidavit in a timely manner to attach to the Complaint. Instead, Plaintiff merely quoted language from the statute. As to the Amended Complaint, not only did Plaintiff again fail to allege any facts supporting a good faith basis to extend the mandate, the statute does not allow compliance through an amended pleading where the complaint itself fails to satisfy the statutory requirements. Thus, Plaintiff has failed to satisfy the requirements of § 15-36-100 and the rules of civil procedure.¹

In summary, Plaintiff did not attach an expert affidavit to her Complaint and failed to plead any facts to support a good faith basis as to why she could not do so. Even in the

¹ After the Court set the Motions to Dismiss for hearing and set the deadline for filing memoranda of law, for the first time, Plaintiff filed two affidavits: one was Plaintiff’s affidavit claiming she had a good faith basis to believe the statute of limitations would run and thus did not attach an expert affidavit to her Complaint and the other was an affidavit of a purported expert. These affidavits were filed almost 5 months after Plaintiff filed her Complaint and long after the 45 day allowance under §15-36-100 and thus these late filings do not change Plaintiff’s failure to comply with the mandates of the statute. Furthermore, as noted, in considering the Motions to Dismiss, the Court looks to the four corners of the pleadings in determining whether the pleadings themselves satisfy the statutory requirements.

Amended Complaint, Plaintiff still failed to attach an expert affidavit or allege any facts as required. The Court, therefore, concludes that the Complaint and Amended Complaint should be and they are hereby dismissed, with prejudice, for failure to state a claim as to Defendants herein.

CONCLUSION

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendants' Motions to Dismiss Complaint and Amended Complaint are GRANTED and the case as to the Defendants is dismissed, with prejudice.

IT IS SO ORDERED.



Honorable L. Casey Manning
Circuit Judge

3-5, 2020